MOTION FILED
AUG 4 - 2006

NOS. 05-1645, 06-11

IN THE

Supreme Court of the United States

CAROLINE WALLACE and EMILY MAW,

Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents,

KAREN LECLERC, ET AL.,

Petitioners,

v.

DANIEL E. WEBB, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AND ASIAN AMERICAN JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Stanley Young
Counsel of Record
Jaideep Venkatesan
Gina M. Parlovecchio
Bhanu K. Sadasivan
HELLER EHRMAN LLP
275 Middlefield Road
Menlo Park, California 94025-3506
(650) 324-7000

Counsel for Amici Curiae

August 4, 2006

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Asian Pacific American Bar Association ("NAPABA") and the Asian American Justice Center ("AAJC") hereby respectfully move, pursuant to Supreme Court Rule 37.3(b), for leave to file the attached brief *amici curiae* in support of the petition for writ of certiorari in this case. NAPABA and AAJC have obtained the consent of the attorneys for the Petitioners. However, Respondents have refused to give such consent.

NAPABA is the national association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA advocates for the legal needs and interests of the Asian Pacific American community and represents the interests of over 40,000 attorneys and 47 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies.

AAJC is a national, non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, and the Asian American Institute have over fifty years of experience in providing legal public policy, advocacy, and community education on discrimination issues.

In the instant case, NAPABA and AAJC support the Petitioners' petition for writ of certiorari because the Louisiana regulation at issue disturbingly echoes past state laws that were used against lawfully admitted non-citizens to restrict their opportunities for earning a livelihood. The Fifth Circuit's refusal to apply strict scrutiny to the Louisiana

regulation fails to take into account the history of discrimination against aliens and their relative lack of political power, both of which this Court has recognized time and again as reasons for applying strict scrutiny. NAPABA and AAJC's brief *amici curiae* addresses the history of discrimination that has justified this Court's application of strict scrutiny to alienage classifications in the past, and explains the present plight of the many nonimmigrant aliens who are valuable and ongoing participants in American society, but who are denied the full protection of the Fourteenth Amendment by the Fifth Circuit's erroneous decision. Thus, NAPABA and AAJC's brief *amici curiae* will aid this Court's decision as to whether to grant a writ of certiorari to Petitioners.

Accordingly, NAPABA and AAJC respectfully request that the Court grant their motion for leave to file the attached brief *amici curiae* in support of Petitioners.

Respectfully submitted,

Stanley Young
Counsel of Record
Jaideep Venkatesan
Gina M. Parlovecchio
Bhanu K. Sadasivan
HELLER EHRMAN LLP
275 Middlefield Road
Menlo Park, CA 94025-3506
(650) 324-7000
Counsel for Amici Curiae

QUESTION PRESENTED

Our nation's immigrant history shows that states have, at times, enacted restrictions on the ability of aliens to earn a livelihood, and such restrictions have been motivated by antagonism toward those of particular races and national origins.

Amici will address the following question:

Whether the Fifth Circuit's application of rational basis review to Louisiana's rule precluding nonimmigrant aliens from practicing law was in error given this Court's custom of applying strict scrutiny review to similar alienage classifications due, in part, to this nation's history of invidious discrimination against aliens.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* i

QUESTION PRESENTED iii

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE FIFTH CIRCUIT'S ASSERTED DISTINCTION BETWEEN "IMMIGRANT ALIENS" AND "NONIMMIGRANT ALIENS" IGNORES THE REALITY OF OUR SOCIETY 4

II. LIVELIHOOD RESTRICTIONS APPLIED TO ALIENS OR SUB-CLASSES OF ALIENS HAVE CREATED TERRIBLE INJUSTICES IN THE PAST 7

III. THIS COURT'S PRIOR DECISIONS HAVE PROTECTED ALIENS—AND SUBCLASSES OF ALIENS—FROM DISCRIMINATORY LAWS AFFECTING THEIR LIVELIHOODS 13

IV. THE PERNICIOUS HISTORY OF ALIENAGE DISCRIMINATION WARRANTS STRICT SCRUTINY IN THIS CASE TO PRESERVE FUNDAMENTAL PRINCIPLES OF AMERICAN JUSTICE 15

V. CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Bradwell v. State,
83 U.S. (16 Wall.) 130 (1872) 17

Graham v. Richardson,
403 U.S. 365 (1971) 3, 14

Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 15

Hurd v. Hodge,
334 U.S. 24 (1948) 14

In re Griffiths,
413 U.S. 717 (1973) 14, 16, 17

LeClerc v. Webb,
419 F.3d 405 (5th Cir. 2005), *reh'g en banc denied*, 444 F.3d 428 (5th Cir. 2006) 4

Nyquist v. Mauclet,
432 U.S. 1 (1977) 14

Oyama v. California,
332 U.S. 633 (1948) 8, 10, 12, 17

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 15

Sugarman v. Dougall,
413 U.S. 634 (1973) 13, 14

Takahashi v. Fish and Game Comm'n,
334 U.S. 410 (1948) 13, 14, 17

Terrace v. Thompson,
263 U.S. 197 (1923) 10

Toll v. Moreno,
458 U.S. 1 (1982).....15

Truax v. Raich,
239 U.S. 33 (1915).....13, 16

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938).....13

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....13

State Cases

In re Bourke,
819 So. 2d 1020 (La. 2002) 3

In re Hong Yen Chang,
24 P. 156 (Cal. 1890).....12

In re Yamashita,
70 P. 482 (Wash. 1902) 12

Federal Statutes

Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (1943) 8

Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254
(1870).....8

Act of July 2, 1946, ch. 534, 60 Stat. 416 (1946).....8

Act of Mar. 26, 1790, ch. 3, § 1, 2 Stat. 103 (1790).....8

McCarran-Walter Act, Pub. L. No. 414, 66 Stat. 163
(1952).....9

Nationality Act of 1940, ch. 876, 54 Stat. 1137
(1940).....8

State Rules & Statutes

Act of Apr. 13, 1850, ch. 97, § 1, 1850 Cal. Stat. 221 7

Act of Apr. 30, 1855, ch. 174, § 1, 1855 Cal. Stat. 216 8

Act of Mar. 30, 1853, ch. 44, § 1, 1853 Cal. Stat. 62 7

Act of May 13, 1854, ch. 49, § 1, 1854 Cal. Stat. 55 8

Act of May 19, 1913, ch. 113, § 1, 1913 Cal. Stat. 206 9

Act of May 2, 1945, ch. 181, § 2(c), 1945 Cal. Stat. 659 13

Act of May 4, 1852, ch. 37, § 1, 1852 Cal. Stat. 84 7

Act of Nov. 2, 1920, § 1, 1920 Cal. Stat. 87 10

Louisiana Supreme Court Rule XVII § 3(B) 3, 6, 13, 16

Miscellaneous

Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 Cal. L. Rev. 529 (1984) 7, 8, 9

Dudley O. McGovney, *The Anti-Japanese Land Law of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) 9

Heather Foster, *Victim of racism will gain posthumous bar membership*, Seattle Post-Intelligencer, February 5, 2001 12

June Kronholz, *Under a Cloud: For Dr. Sengupta, Long-Term Visa Is a Long Way Off*, Wall St. J., June 27, 2006 ..... 4, 5, 6

Kelly Jefferys & Nancy Rytina, Office of Immigration Statistics, U.S. Dep't of Homeland Security, *Annual Flow Report: U.S. Legal Permanent Residents, 2005* (Apr. 2006), available at http://www.uscis.gov/graphics/shared/statistics/index.htm#flow (last visited Aug. 3, 2006) 5

Note, 54 Harv. L. Rev. 860 (1941) 8

Robert Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941*, 38 J. Econ. Hist. 205 (1978) 9, 10

Ronald Takaki, *Strangers from a Different Shore: A History of Asian Americans* (1989) 7, 8, 9

Thomas Sowell, *Ethnic America: A History* (1981) 7

U.S. Dep't of State, Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html (last visited Aug. 3, 2006) 5

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Asian Pacific American Bar Association ("NAPABA") is a national, nonprofit, nonpartisan organization whose mission, in addition to serving the professional interests of our members, is to advocate for the legal needs and civil rights of the Asian Pacific American community. NAPABA is an association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA represents the interests of over 40,000 attorneys and 47 local Asian Pacific American bar associations. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights, and combating anti-immigrant backlash and hate crimes. NAPABA's interest in this case arises from the fact that historically states have used alienage classifications as a vehicle to discriminate against individuals of Asian Pacific descent. Given NAPABA's role in ensuring equality to Asian Pacific Americans, and the history of discrimination against non-citizen Asian Pacific individuals in which states restricted the rights of aliens to enter professions, own land and operate businesses, NAPABA has a substantial interest in discouraging any laws based on alienage classifications that have the effect of inflicting those same injustices.

---

[1] In accordance with Supreme Court Rule 37.3(a), *Amici Curiae* have filed with the Clerk of the Court letters from Petitioners consenting to the filing of this brief. No person or entity other than *Amici Curiae*, their members or their counsel made a monetary contribution toward the preparation or submission of the brief, and no counsel for Petitioners or Respondents had any role in authoring this brief.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California and the Asian American Institute have over fifty years of experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC is interested in the present case because it implicates the availability of civil rights protections and the full social and political participation of Asian Americans in this country.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision not to apply strict scrutiny to Louisiana's Rule 3(B)[2] prohibition against certain non-citizens becoming lawyers contravenes long-standing precedents designed to protect discrete and politically disadvantaged minorities from unfair treatment. The regulation at issue here hauntingly echoes past state laws that prohibited certain subclasses of aliens from pursuing particular occupations or from owning land, or that imposed heavier burdens on persons in certain industries, based solely on their status as aliens. The Fifth Circuit has forgotten that alienage classifications have been a vessel for irrational jealousy and hatred. That history has justified this Court's earlier conclusion that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (footnotes omitted). This Court should grant the petitions for writ of certiorari in order to bring under the shield of the Equal Protection Clause the many thousands of "nonimmigrant aliens" who, despite that label and despite the Fifth Circuit's factual misconceptions, are full and valuable members of our society.

---

[2] Louisiana Supreme Court Rule XVII § 3(B) ("Rule 3(B)") requires that "[e]very applicant for admission to the Bar of this state shall * * * [b]e a citizen of the United States or a resident alien thereof." As defined by the Louisiana Supreme Court, a "resident alien" is an alien who has "attained permanent resident status in the United States." *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002).

ARGUMENT

I. THE FIFTH CIRCUIT'S ASSERTED DISTINCTION BETWEEN "IMMIGRANT ALIENS" AND "NONIMMIGRANT ALIENS" IGNORES THE REALITY OF OUR SOCIETY

The Fifth Circuit disregarded this Court's earlier decisions because of its belief that the status of aliens who do not hold permanent resident visas (whom the Fifth Circuit calls "nonimmigrant aliens") is "far more constricted than that of resident aliens." *LeClerc v. Webb*, 419 F.3d 405, 418 (5th Cir. 2005), *reh'g en banc denied*, 444 F.3d 428 (5th Cir. 2006). Attempting to rationalize and limit this Court's earlier decisions, the Fifth Circuit argues that permanent resident aliens are "similarly situated to citizens in their economic, social and civic (as opposed to political) conditions," and that holders of F-1 student or H1-B temporary visas are not so similarly situated. *Id.* But the Fifth Circuit ignores the reality that "nonimmigrant aliens," just like permanent resident aliens, occupy an important place in our society and also deserve the full benefit of the Equal Protection Clause.

The Wall Street Journal recently told the story of Manajit Sengupta, a meteorologist who has been in the United States for more than 10 years on F-1 student and H1-B temporary visas. *See* June Kronholz, *Under a Cloud: For Dr. Sengupta, Long-Term Visa Is a Long Way Off*, Wall St. J., June 27, 2006, at A1, A13. He owns a home in the U.S., is raising a six-year-old U.S.-born citizen daughter here, and believes, "This is my country, as far as I'm concerned now." *Id.* at A13. While his employer is now seeking to obtain permanent residency status for him, Dr. Sengupta continues to wait in his current status as an H1-B visa holder. *See id.* at A1.

Dr. Sengupta is not the only "nonimmigrant alien" enduring that wait. Approximately one million aliens a year

become permanent legal residents, with a majority (66% in 2005) living in the United States when they become legal permanent residents. *See* Kelly Jefferys & Nancy Rytina, Office of Immigration Statistics, U.S. Dep't of Homeland Security, *Annual Flow Report: U.S. Legal Permanent Residents, 2005* (hereinafter "*Annual Flow Report*") 1 (Apr. 2006), available at http://www.uscis.gov/graphics/shared/statistics/index.htm#flow (last visited Aug. 3, 2006). And the application process to do so is cumbersome:

> The Labor Department, which clears one of the three forms that most skilled immigrants must file to become permanent residents, has a backlog of 235,000 cases. The Citizenship and Immigration Service, which clears the second form, is 180,000 cases behind.

Kronholz, *supra*, at A1. According to the current visa bulletin published by the U.S. Department of State, which is the agency that actually issues the permanent resident visas, there is a five-year backlog for employer-sponsored permanent resident visas for skilled workers and professionals. *See* U.S. Dep't of State, Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html (last visited Aug. 3, 2006). The Fifth Circuit's view of all "nonimmigrant aliens" as "transients" who can be treated differently because they have less of an attachment to this country is seriously flawed, and fails to take into account the slowness of our immigration bureaucracy.

As the largest group waiting to become legal permanent residents, Asian "nonimmigrant aliens" suffer adversely from the chronic backlog in the immigration process. In 2005, Asia was the leading region of origin of aliens who became legal permanent residents. *See Annual Flow Report* at 3. On a per country basis, India and China,

respectively contributed the second and third largest numbers of legal permanent residents. *See id.* at 5.

One of Amici's counsel and a NAPABA member, Bhanu Sadasivan, herself illustrates the wrongness of the Fifth Circuit's view. Born in India, Dr. Sadasivan has been in the United States for twelve years on temporary and student visas. She arrived in the United States in 1991 on an F-1 student visa to study immunology at Yale University. After completing her Ph.D. in 1997, she became a post-doctoral follow at Brigham and Women's Hospital in Boston, which, along with the Harvard Medical School, helped her obtain an H-1B visa. In 2001, she decided to study law and was admitted to the Boalt Hall School of Law at the University of California, Berkeley. She then applied for an F-1 student visa and remained a nonimmigrant student visa holder until 2004. Dr. Sadasivan currently practices as a patent litigation attorney in California. Had Louisiana's Rule 3(B) applied to her, she likely would never even have considered going to law school.

The Fifth Circuit's decision, if allowed to stand, would permit a state to discriminate, based on their alien status and without strict scrutiny, against thousands of "nonimmigrant aliens" in situations like Dr. Sengupta's or Dr. Sadasivan's, who just like "immigrant aliens" are similar to citizens "in their economic, social and civic conditions." The Fifth Circuit's reasoning rings false especially in light of the contributions of H1-B visa holders, which, according to Stanford University economist Dan Siciliano, are "necessary to avoid irreversible damage" to the U.S. economy. Kronholz, *supra*, at A13. According to the National Science Foundation, the "foreign-born now account for about half of the Ph.D. engineers, life scientists, physical scientists and math and computer scientists in the U.S. . . . ." *Id.* The Fifth Circuit's strained distinction between "immigrant aliens" and "nonimmigrant aliens" in deciding who should benefit from

the full safeguards of the Equal Protection Clause would leave many of those people exposed to disparities in treatment under our laws, based solely on their alien status. Such a distinction has no warrant in either justice or wisdom, as a review of our history will disclose.

II. LIVELIHOOD RESTRICTIONS APPLIED TO ALIENS OR SUB-CLASSES OF ALIENS HAVE CREATED TERRIBLE INJUSTICES IN THE PAST.

Historically, livelihood restrictions against aliens, in many cases specifically Asian immigrants, have stemmed from national origin and/or racial bias. Early Chinese immigrants to the United States, for example, "were feared as competitors whose harder work and longer hours for cheap pay would drive down the standard of living of American labor." Thomas Sowell, *Ethnic America: A History* 136-37 (1981). California adopted several laws that imposed special taxes on miners who were not citizens. *See* Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 Cal. L. Rev. 529, 543-45 (1984). Facially, the laws were neutral as to race and national origin. *See, e.g.*, Act of Apr. 13, 1850, ch. 97, § 1, 1850 Cal. Stat. 221, 221; Act of May 4, 1852, ch. 37, § 1, 1852 Cal. Stat. 84, 84; Act of Mar. 30, 1853, ch. 44, § 1, 1853 Cal. Stat. 62, 62. However, the historical context indicates that Chinese miners were their primary targets. McClain, *supra*, at 536, 539-40. In the 1850s, "24,000 Chinese, two thirds of the Chinese population in America, were working in California mines." Ronald Takaki, *Strangers from a Different Shore: A History of Asian Americans* 82 (1989).

California's laws did not just distinguish aliens from citizens. Rather, some of them focused on particular categories within the class of aliens. The 1854 version of the

California foreign miners tax law applied only to those aliens who had not "declared [their] intention[s] to become" U.S. citizens. Act of May 13, 1854, ch. 49, § 1, 1854 Cal. Stat. 55, 55. The 1855 version provided that "foreigner[s] ineligible to become . . . citizen[s] of the United States" were required to pay higher taxes than those foreigners who were eligible for citizenship. Act of Apr. 30, 1855, ch. 174, § 1, 1855 Cal. Stat. 216, 216–17. These distinctions between categories of aliens—between those who had declared their intention to become citizens and those who had not, and between those who were eligible to become citizens and those who were not so eligible—confirmed that the laws were aimed at the Chinese miners, since it was only the Chinese, being non-white, who were ineligible for citizenship. McClain, *supra*, at 543-44; Takaki, *supra*, at 82.[3] The enforcement of these laws

---

[3] Congress, for much of our history, used racial categories to define eligibility for naturalization. First, only "free white person[s]" were eligible to become naturalized U.S. citizens. Act of Mar. 26, 1790, ch. 3, § 1, 2 Stat. 103, 103 (1790). Congress then extended eligibility to "aliens of African nativity and to persons of African descent." Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (1870). "In 1940, descendants of races indigenous to the Western Hemisphere were also made eligible, [Nationality Act of 1940, ch. 876,] 54 Stat. [1137,] 1140 [(1940)]; in 1943 Chinese were made eligible, [Act of Dec. 17, 1943, ch. 344,] 57 Stat. [600,] 601 [(1943)]; and in 1946 Filipinos and persons of races indigenous to India were made eligible, [Act of July 2, 1946, ch. 534,] 60 Stat. 416, [416 (1946)] . . . . . While it is not altogether clear whether the statute should be interpreted to include or to exclude certain peoples, *see* Note, 54 Harv. L. Rev. 860, 864-5 (1941), it seems to be accepted [as of 1948] that Japanese are among the few groups not eligible for citizenship." *Oyama v. California*, 332 U.S. 633, 635 n.3 (1948). Not until 1952, with the passage of the

(Footnote continued)

by local sheriffs often led to violence against, and the murders of, Chinese miners. McClain, *supra*, at 548-53, nn.52, 148. The atrocities, however, often went without judicial remedy given the fact that California's laws also prohibited the acceptance of testimony by Chinese witnesses in court. *Id.* at 548-53.

The immigration of Japanese to the United States later sparked other racial animosities, leading California and other states to adopt laws prohibiting aliens from owning land. Takaki, *supra*, at 203-08. These laws on their face applied to all aliens regardless of race or national origin, but they were aimed mainly at immigrant Japanese farmers. *See* Robert Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941*, 38 J. Econ. Hist. 205, 215 (1978); Dudley O. McGovney, *The Anti-Japanese Land Law of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) (collecting state statutes). As California's Attorney General stated, the goal of such laws was "to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land." Higgs, *supra*, at 215.

Under the California Alien Land Law of 1913, only "aliens eligible to citizenship" (which the Japanese were not, *see supra* note 3) could acquire land. Act of May 19, 1913, ch. 113, § 1, 1913 Cal. Stat. 206, 206. All other aliens could acquire land only if a treaty between their country of origin and the United States so permitted. *Id.* § 2. If no such treaty existed, they were limited to the right to lease agricultural land for no more than three years. *Id.* The state also

---

McCarran-Walter Act, did Congress abandon general color or geographic classifications in favor of a quota system based on national origin. *See* McCarran-Walter Act, Pub. L. No. 414, 66 Stat. 163 (1952).

prevented alien-controlled corporations from owning agricultural lands. *Id.* § 3. And in the event that a covered alien would otherwise acquire title to any real estate, the statute provided that such property would escheat to the state. *Id.* §§ 4–6. When Japanese immigrant farmers sought to evade the restrictions of the 1913 law through purchasing land in the names of their U.S.-born citizen children, California enacted the Alien Land Law of 1920, which forbade leasehold as well as ownership and barred the immigrants from acting as guardians for minors owning or leasing land. The 1920 law again called for escheat to the state of any land found to be held in violation of its prohibitions. Act of Nov. 2, 1920, § 1, 1920 Cal. Stat. 87, 87. These California laws were subject to a variety of challenges in federal and state courts in the 1920s, but were generally upheld. Higgs, *supra*, at 219; *see, e.g.*, *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding a similar law in the State of Washington).

In later litigation in this Court, California "disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect," pointing out that "nowhere in the statute is there a single mention of race, color, creed or place of birth or allegiances as a determinant of who may not own or hold farm land." *Oyama v. California*, 332 U.S. 633, 650 (Murphy, J., concurring). But, as Justice Murphy pointed out in a well-researched and detailed opinion concurring in the Court's decision to invalidate the law as applied to the citizen son of a Japanese immigrant:

> The California Alien Land Law was spawned of the great anti-Oriental virus which, at an earlier date, infected many persons in that state. . . . Beginning in 1850, with the arrival of substantial numbers of Chinese immigrants, racial prejudices and discriminations began to mount. Various laws and ordinances were

enacted for the purpose of discouraging the immigrants and dramatizing the native dissatisfaction. Individual Chinese were subjected to many acts of violence. Eventually, Congress responded to this popular agitation and adopted Chinese exclusion laws.

It was not until 1900 that Japanese began to arrive in California in large numbers. . . . [T]he arrival of the Japanese fanned anew the flames of anti-Oriental prejudice. History then began to repeat itself. White workers resented the new influx, a resentment which readily lent itself to political exploitation. Demands were made that Japanese immigration be limited or prohibited entirely. Numerous acts of violence were perpetrated against Japanese businessmen and workers, combined with private economic sanctions designed to drive them out of business. Charges of espionage, unassimilativeness, clannishness and corruption of young children were made against these "Mongolian invaders." Campaigns were organized to secure segregated schools and to preserve "America for the Americans."

* * * *

Many Japanese were engaged in agricultural pursuits in 1913 and they constituted a substantial segment of the California farm labor supply. From 1900 to 1910, Japanese-controlled farms in California had increased from 4,698 acres to 99,254 acres. The agricultural situation thus offered a fruitful target for the anti-Japanese forces, who had

> been balked in their attempts to secure a ban on all Japanese immigration and to outlaw Japanese acquisition and enjoyment of residential and commercial property. In this new endeavor they were eminently successful.

Oyama, 332 U.S. at 651-55 (Murphy, J., concurring).

Alienage classifications also became the vehicle for denying Asians the right to practice law in the United States. Hong Yen Chang, a native of China sought to practice law in the United States and submitted a certificate of naturalization issued by a New York court. Noting that federal law did not allow citizenship for "persons of the Mongolian race," the California Supreme Court voided the certificate of naturalization and denied Hong Yen Chang the right to practice law. *In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890). Like Hong Yen Chang, Takuji Yamashita, a Japanese national, also sought to practice law. The Supreme Court of Washington denied Mr. Yamashita's application to practice law on the ground that Mr. Yamashita was ineligible for citizenship. *In re Yamashita*, 70 P. 482 (Wash. 1902). In an unprecedented move, the Washington Supreme Court recently reversed its ruling and admitted Mr. Yamashita posthumously to the Washington state bar. *See* Heather Foster, *Victim of racism will gain posthumous bar membership*, Seattle Post-Intelligencer, February 5, 2001, at 1. Recognizing the grave injustice to Mr. Yamashita, Washington Supreme Court's chief justice, Gerry Alexander, stated, "it's important to symbolically right this wrong." *Id.* As this Court's past decisions have shown, application of strict scrutiny in the present case would avoid similar injustices in the future.

III. THIS COURT'S PRIOR DECISIONS HAVE PROTECTED ALIENS—AND SUBCLASSES OF ALIENS—FROM DISCRIMINATORY LAWS AFFECTING THEIR LIVELIHOODS

The Fifth Circuit's decision not to accord suspect class status to Petitioners and not to exercise strict scrutiny in judging Louisiana's Rule 3(B) ignores the sad history of alienage distinctions in U.S. law. The Court should grant a writ of certiorari in this case in order to fulfill its promise of protecting "discrete and insular minorities" through heightened judicial scrutiny. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). From an early time, this Court has recognized that, "The [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). "It is established . . . that an alien is entitled to the shelter of the Equal Protection Clause. This protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who 'work for a living in the common occupations of the community.'" *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) (citations omitted) (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

The Court should follow here the path it earlier laid out in *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). There, the Court struck down a 1945 California law banning the issuance of commercial fishing licenses to any "person ineligible to citizenship." Act of May 2, 1945, ch. 181, § 2(c), 1945 Cal. Stat. 659, 600. This law, like the 1854 and 1855 foreign miner tax and the alien land laws, distinguished among different categories of aliens, *i.e.*, between aliens eligible for citizenship (who could receive fishing licenses) and aliens not eligible for citizenship (who could not). Justice Murphy, in his concurring opinion, observed that the ban was a "direct outgrowth of antagonism toward persons of Japanese ancestry" and "was intended to

discourage the return to California of Japanese aliens," who had been excluded from the state during World War II. *Takahashi*, 334 U.S. at 422-24 (Murphy, J., concurring). However, the Court's majority found it "unnecessary to resolve th[e] controversy concerning the motives that prompted enactment of the legislation." *Id.* at 418. Rather, the Court noted that

> the Fourteenth Amendment protect[s] "all persons" against state legislation bearing unequally upon them either because of alienage or color. *See Hurd v. Hodge*, 334 U.S. 24 [1948]. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.

Id. at 420. Despite the fact that the law prohibited only a subclass of aliens from receiving fishing licenses, the Court found the law to be an impermissible discrimination based on alien status. Referring also to the federal government's exclusive power over immigration, the Court rejected California's claims that the state could "adopt one or more of the same classifications [as used by the federal government to regulate immigration and naturalization] to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living." *Id.* at 418-19.

Later decisions of this Court applied strict scrutiny to a variety of alienage classifications that disadvantaged aliens or subclasses of aliens. *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (higher education assistance); *Sugarman*, 413 U.S. at 634 (civil service); *In re Griffiths*, 413 U.S. 717, 721 (1973) (bar membership); *Graham*, 403 U.S. at 373 (welfare

benefits). In no case did the Court condition its holdings on the fact that the aliens at issue held permanent resident visas. Nor in any of those cases did the Court exclude "nonimmigrant aliens" from the scope of the relief granted.

IV. THE PERNICIOUS HISTORY OF ALIENAGE DISCRIMINATION WARRANTS STRICT SCRUTINY IN THIS CASE TO PRESERVE FUNDAMENTAL PRINCIPLES OF AMERICAN JUSTICE

This Court has repeatedly recognized that a history of discrimination against a particular class of people, such as aliens, makes regulations based on such a classification appropriate for strict scrutiny analysis. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (explaining that "traditional indicia of suspectness" include the fact that a class has been "subjected to . . . a history of purposeful unequal treatment"). Because of their status as non-citizens, aliens are less capable of protecting themselves in the political process, and therefore require greater protection by the courts. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 (1976), the Court struck down a federal policy that barred all non-citizens from employment in the competitive civil service. This Court noted that aliens are a "class of persons who, entirely apart from the rule [discriminating against them on the basis of alienage], are already subject to disadvantages not shared by the remainder of the community," such as lacking the right to vote. *Id.* at 102. As Justice Blackmun noted in *Toll v. Moreno*, 458 U.S. 1, 20 (1982) (Blackmun, J. concurring) (citations omitted), "both common experience and the unhappy history reflected in our cases . . . demonstrate that aliens often have been the victims of irrational discrimination." Such "disparate treatment accorded to a class of 'similarly circumstanced' persons who historically have been disabled by the prejudice of the majority" led the Court, in Justice Blackmun's view,

"to conclude that alienage classifications 'in themselves supply a reason to infer antipathy,' . . . and therefore demand close judicial scrutiny." *Id.* at 20-21 (quotations omitted).

In *Griffiths* this Court acknowledged that:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. (Citations omitted). If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Griffiths, 413 U.S. at 720 (quoting *Truax*, 239 U.S. at 41). The Fifth Circuit's decision not to apply strict scrutiny to the alienage classification at issue here ignores that important principle.

V. CONCLUSION

We should take this lesson from our nation's immigrant history: restrictions on the ability of aliens to earn a livelihood have been entangled with antagonisms and jealousies directed toward those of particular races and national origins. That history warrants the application of "suspect class" analysis to aliens adversely affected by Rule 3(B). The role of lawyers in the preservation of a just society, and the importance of fostering legal representation for the most disadvantaged segments of our national community, make it even more important that Rule 3(B) undergo strict scrutiny to ensure its compliance with the Equal Protection Clause.

For the many thousands of "nonimmigrant aliens" who cherish the freedoms and opportunities that their adopted country provides, and who seek through their work and contributions to repay those gifts, such strict scrutiny may be the only defense against the kind of injustice that scourged earlier generations of American immigrants. The stories of today's immigrants verify this Court's observation that, "[f]rom its inception, our Nation welcomed and drew strength from the immigration of aliens," and that "admission to the practice of law in the courts of a State 'in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all.'" *Griffiths*, 413 U.S. at 719 (quoting *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872)). By granting a writ of certiorari to review the Fifth Circuit's unduly narrow constriction of the Equal Protection Clause's scope, this Court would continue to uphold the ideals set forth in cases such as *Griffiths*, *Oyama* and *Takahashi*—ideals that make our country a model for the rest of the world.

Respectfully submitted,

Stanley Young
Counsel of Record
Jaideep Venkatesan
Gina M. Parlovecchio
Bhanu K. Sadasivan
HELLER EHRMAN LLP
275 Middlefield Road
Menlo Park, CA 94025-3506
(650) 324-7000
Counsel for Amici Curiae

August 4, 2006